

## IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 09-0624

FILED

DEC 8 2009

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

WILLIAM RONALD HENDERSON,

Petitioner and Appellant,

v.

ORDER

STATE OF MONTANA,

Respondent and Appellee.

On September 14, 2009, William Ronald Henderson, appearing as a self-represented litigant (Henderson), filed an out-of-time amended notice of appeal in the Eleventh Judicial District Court, appealing from two orders: Order on Motion to Stay, for Court Records and for Substitute Counsel dated June 9, 2009, and Order and Rationale on Petition for Postconviction Relief dated July 16, 2009, from the Eleventh Judicial District Court, Flathead County. However, the Clerk of that court returned the notice and informed Henderson that he must file the notice of appeal with the Clerk of Supreme Court and that a certificate of mailing to opposing parties must be included. On October 6, 2009, Henderson filed an amended notice of appeal with this Court, which is not in affidavit form and does not comply with the requirements of M. R. App. P. 4(6).

By way of background, Henderson is convicted of deliberate homicide and use of a firearm in commission of the homicide. Henderson appealed his conviction, raising only one issue—whether his counsel provided ineffective assistance of counsel in asserting in his opening statement that the jury would hear from Henderson, and then failing to call Henderson as a witness. We concluded that Henderson's claim was not sufficiently record-based, and dismissed the appeal. In doing so, we stated that whether the representation of counsel constituted ineffective assistance would be best explored in

an evidentiary hearing in a postconviction proceeding. *State v. Henderson*, 2003 MT 285, ¶¶ 18-19, 318 Mont. 31, 78 P.3d 848.

Subsequently, Henderson failed to file a timely petition for postconviction relief— notwithstanding our suggestion in *Henderson*, ¶ 18. However, in October 2005, Henderson filed in this Court a petition for a writ of supervisory control, alleging ineffective assistance of counsel (IAC) and violation by his counsel of the Montana Rules of Professional Conduct, arising from counsel’s refusal to communicate with Henderson. *Henderson v. State*, Cause No. 05-626. Henderson claimed the only communication he received for many months from counsel was on January 5, 2005, when counsel visited him at the Crossroads Correctional Center to inform him that he was seeking to be removed as counsel of record, and presented him with a draft petition for postconviction relief. Though counsel instructed Henderson to call him on January 8, Henderson claimed that counsel refused to accept calls from Henderson on January 8, 2008, or at any time thereafter. The file includes a purported log showing dates and times Henderson attempted to telephone his counsel from 2004 through January 8, 2005—as often as several attempts each day. Henderson also claimed the District Court erred in failing to appoint other counsel to represent him. Henderson contended that inadequate and ineffective assistance of counsel, coupled with the District Court’s refusal to appoint alternate counsel, constituted deprivation of due process of law. On November 9, 2005, we denied his petition, again stating that postconviction relief was the appropriate remedy.

Henderson states that he now is serving his sentence in a Washington prison under the Interstate Compact and has had access to only the 2005 Montana Rules of Appellate Procedure, with which he complied in filing a timely notice of appeal with the District Court. Henderson asks that he be allowed to proceed with his appeal, and requests permission to proceed without paying the filing fee.

The Court records and Henderson’s contentions raise questions as to whether Henderson received ineffective assistance of counsel, and whether he was entitled to appointment of counsel to prepare a petition for postconviction relief based upon our

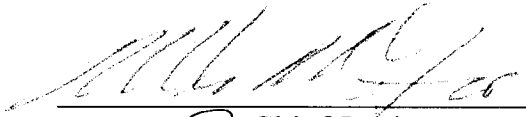
suggestion in *Henderson*. Accordingly, we are moved to appoint counsel for Henderson to assist him in demonstrating that extraordinary circumstances exist, justifying an out-of-time appeal under M. R. App. P. 4(6). Good cause appearing,

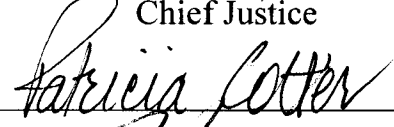
IT IS ORDERED that leave to proceed without paying the filing fee is GRANTED.

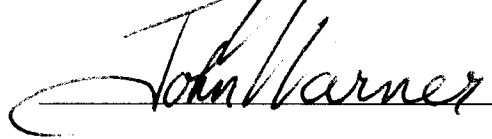
IT IS FURTHER ORDERED that the Office of Appellate Defender (OAD) is appointed to review this matter and to represent Henderson in filing a request for an out-of-time appeal that complies with M. R. App. P. 4(6), and any other claims OAD deems necessary and appropriate.

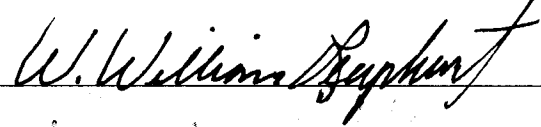
IT IS FURTHER ORDERED that the Clerk is directed to provide a copy hereof to Henderson, to the Office of Appellate Defender, and to counsel of record.

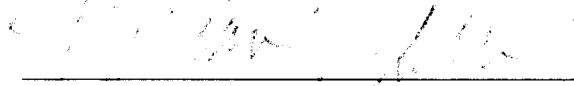
DATED this 4<sup>th</sup> day of December, 2009.

  
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Chief Justice

  
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Patricia Potter

  
\_\_\_\_\_  
John Varner

  
\_\_\_\_\_  
W. William Byrd

  
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Justices